

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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MAR 27 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of *Computer III* Further)
Remand Proceedings: Bell Operating)
Company Provision of Enhanced)
Services)

CC Docket No. 95-20

1998 Biennial Regulatory Review --)
Review of *Computer III* and ONA)
Safeguards and Requirements)

CC Docket No. 98-10

**COMMENTS OF
NORTHPOINT COMMUNICATIONS, INC.**

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March 27, 1998

SUMMARY

NorthPoint Communications, Inc., one of the nation's first data CLEC providers, currently offers DSL service to small and medium-sized businesses in California and is certified or awaiting certification in fifteen states. NorthPoint comments herein on only one aspect of the instant proceeding: the issues raised by the potential extension of access to Section 251 unbundled services to ISPs, even though ISPs are not considered to be "carriers" under the Telecommunications Act.

NorthPoint believes that if the Commission decides to allow ISPs to obtain access to such unbundled services without requiring ISPs to comply with certain rules and obligations currently applicable to DSL carriers, the Commission must take two correlative steps. It must ensure a level playing field by uniformly waiving rules for all ISP and non-ISP DSL service providers, and it must carefully specify which rules are to be waived to prevent market confusion which could hinder both ISPs and non-ISPs.

In broad outline, the areas requiring careful consideration encompass state certification requirements, interconnection agreements, collocation, unbundled loops, and taxes, tariffs, and reports. In short, simplifying the rules for ISPs is not at all simple and merely mandating the availability of section 251 services to ISPs may not permit them to provide DSL service. The problems currently faced by ISPs in fact relate not so much to the current need for carrier status but also to the complex current monopoly bottleneck system in which services must be obtained from unwilling vendors.

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**COMMENTS OF
NORTHPOINT COMMUNICATIONS, INC.**

NorthPoint Communications, Inc. ("NorthPoint"), in response to the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned dockets,¹ herewith files its initial comments. NorthPoint's comments are focused solely on one question raised by the Commission's NPRM: Whether the Commission should extend access to Section 251 unbundled services to ISPs, despite the fact that ISPs are not considered to be "carriers" under the Telecommunications Act.² NorthPoint believes that if the Commission decides to allow ISPs to obtain access to section 251 unbundled services without requiring them to comply with certain rules currently applicable to DSL carriers, then the Commission must 1) ensure a level-playing field by uniformly waiving rules for all ISP and non-

¹ FCC 98-8, rel. January 30, 1998.

² FNPRM, para. 95

ISP DSL service providers; and 2) must carefully specify which rules are waived to prevent market confusion which could hinder ISPs and non-ISPs alike.

NorthPoint is a data CLEC currently providing DSL service, via its ISP customers, to small and medium-sized businesses in California. NorthPoint is certificated or pending certification in fifteen states, and about to commence service in Boston and New York. As one of the nation's first DSL providers, it has valuable experience which it believes is relevant in answering whether and how the Commission might liberalize the current Section 251 requirement that unbundled network elements are currently available only for telecommunications carriers.

Any ISP or non-ISP currently has the ability, like NorthPoint and other companies which have recently obtained CLEC status in order to provide DSL service, to obtain certification as a carrier, and follow the other state and federal requirements attendant to carrier status. Thus, the idea that Section 251 requirements should be relaxed for ISPs is based on a more specific concern that the complex and often onerous state and federal regulations which apply to carriers can deter companies from applying to be a carrier in order to provide service.

In the event the Commission determines that current requirements for provision of DSL service are prohibitively complex or onerous, and should be waived in whole or part, it is imperative that the Commission eliminate any such rules for all DSL providers, regardless of whether or not they happen to be ISPs. Otherwise, the Commission will initiate a discriminatory and inequitable system under which similar companies providing identical services face dramatically different rules and regulations. If a company that happens to be an ISP were allowed to provide DSL service without meeting requirements currently in place for DSL providers, *e.g.*, state certification, then fairness and equity require that the state certification

requirement be removed for *any* company providing DSL service. It would be highly counterproductive for this Commission to relax current rules in order to make it easier for ISPs to provide DSL service, but do so in a way that penalizes and potentially deters current DSL providers from continuing to provide service.³

In addition to uniformly applying any waived rules, the Commission must be careful to identify the specific rules it waives to avoid disruptive market confusion. For example, there are some fundamental hurdles a data CLEC like NorthPoint must currently overcome in order to provide DSL service. NorthPoint must obtain state certification, negotiate (and gain approval of) interconnection agreements with ILECs on a state-by-state basis, order collocation and loops from the ILEC, comply with various tariff and tax requirements, and file certain ongoing state and federal reports. If the Commission is going to allow ISPs to gain access to section 251 services without obtaining carrier status, it must think through and specify which of these rules it intends to waive or relax:

- 1) State Certifications. DSL service is clearly a basic service under the Act and Commission regulations.⁴ Does the Commission intend, and have jurisdiction to, exempt all DSL providers from obtaining requisite state CLEC certifications?

³ It is common in the current telecommunications environment that companies face different regulatory rules depending on the specific services they provide. For example, an otherwise certificated and tariffed IXC may initiate ISP services, which are not in themselves tariffed or regulated. Thus, the IXC services of the company are provided pursuant to applicable regulations while the ISP services are provided on an unregulated basis. The point is that rules typically depend on the nature of the services, not the label of the provider. It follows that if the Commission deregulates the provision of DSL services, the deregulation should apply to all DSL providers, regardless of whether or not they also provide ISP service.

⁴ Frame Relay Order, 10 FCC Rcd 13,717 (Comm. Car. Bur. 1995).

- 2) Interconnection Agreements. Because many services remain untariffed, interconnection agreements currently serve as the only basis for establishing the full range of service and rates under which CLECs providing DSL service can obtain necessary ILEC services. Thus, simply mandating that interconnection agreements are not required would leave ISPs in the untenable position of having a right to service, but having no established rates or terms under which they could expect to receive the service. Conversely, the Commission could require ILECs to establish state and federal tariffs for all services required by CLECs providing DSL service so ISPs could order service without interconnection agreements. However, such a mandate might raise jurisdictional questions, disputes over the sufficiency of the list of services which are tariffed, as well as disputes over the fairness of the proposed tariff rates and how they compare to rates in negotiated contracts.
- 3) Collocation and Unbundled Loops. As noted above, these critical services are not yet tariffed in many states, so it is unclear how ISPs could order in the absence of negotiating interconnection terms and rates. Moreover, based on NorthPoint's experiences, constant vigilance is required to secure these services even after they appear to be offered in contracts or tariffs. For example, despite the fact that critical collocation space is running out, inflexible and limited ILEC models for virtual collocation have prevented any DSL CLECs from negotiating or implementing a workable model for virtual collocation. Likewise, NorthPoint has faced constant pressure from ILECs regarding its ability to order unbundled loops (and a host of supporting service and OSS support) to provide DSL service.⁵
- 4) Taxes and Tariffs and Reports. Unlike non-carrier ISPs, carriers providing DSL service face a variety of regulatory taxes, fees, universal service contribution obligations, tariff and reporting requirements. The implication of granting section 251 rights without carrier status is that these obligations might no longer attach. This would need to be clarified. Is the Commission therefore ready to exempt ISPs

⁵ Collocation space, which is crucial for many emerging competitors, is growing ever tighter. A wide-open regime, whatever its theoretical advantages, must take into account the practical reality that there is not likely to be enough physical space to accommodate everyone. In utilizing a scarce resource, such as collocation space, the Commission must be concerned that its policies promote the goals of the 1996 Act to open local exchange markets to competition. If expanded availability of UNEs results in further exhaustion of collocation space for non-carrier activities, that result, which will disserve the public interest, must be balanced against any perceived benefit.

and all non-ISP DSL service providers from the Commission's Universal Service fee? Likewise, are all state and federal tariff requirements to be dropped for DSL service providers, and can and will the Commission exempt all ISP and non-ISP service providers from the full range of state and federal reporting requirements?


In sum, the premise behind the call for liberalization – which assumes that ISPs could easily provide DSL service if the Commission merely mandates that they can obtain section 251 services – may be somewhat oversimplified. Existing barriers to entry may stem not so much from the current obligation that DSL providers obtain carrier status, but rather may be more fundamentally associated with the complex current monopoly bottleneck system in which services must be obtained from unwilling vendors.

Thus, in order to comply with rules which are not waived, and in order to safeguard any rights which the Commission grants, ISPs are likely to have to assemble the in-house regulatory and ILEC relations expertise currently required of DSL carriers, and relaxing certain rules in themselves may not be sufficient to ensure successful DSL service provision by ISPs. In such an environment, the Commission must be careful not to penalize current DSL providers who are already enhancing the utility of local loops for underserved small and medium sized business consumers. If the Commission decides to relax certain requirements associated with the

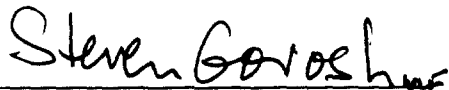
provision of DSL service, it must do so equally for all providers, and must do so with the precision necessary to avoid service disruptions for all DSL providers.

Respectfully submitted,

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March 27, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March 1998, copies of Comments of NorthPoint Communication, Inc. were served by hand-delivery on the following:

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